Tan Ah Chio & Ors v Lua Kim Soon & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02–157–01 OF 2013

B

ABDUL WAHAB PATAIL, ZAWAWI SALLEH AND UMI KALTHUM JJCA

20 AUGUST 2014

C

Civil Procedure — Appeal — Interference by appellate court — Assessment of evidence — Two conflicting versions of facts — Judge simply opting to rely on his own interpretation of the documentary evidence — Whether amounted to serious misdirection — Whether appellate interference warranted

D

Companies and Corporations — Members' right — Locus standi — Breach of duties — Appellants and respondents were company's former and present shareholders respectively — Whether respondents had locus standi to bring counterclaim against appellants for losses suffered by company — Whether actual losses suffered due to the breach — Whether losses suffered proven — Whether respondents personal rights violated — Whether derivative action should have been commenced — Companies Act 1965 s 132

E

The appellants and the respondents entered into a sale and purchase of shares agreement ('the principal agreement') whereby the appellants agreed to sell their shares in two companies ('the companies') to the respondents. The total purchase price for the sale was RM8m which was to be paid in four tranches. As required by the principal agreement, the appellants transferred all their shares to the respondents and resigned as directors of the companies. The respondents paid the appellants the first and second tranches totalling RM5m as per the payment schedule. Before the expiry of the due date for the third and fourth tranches, the appellants and the respondents executed a supplemental agreement to reschedule the payment dates for the third and fourth tranches. Nevertheless, the respondents failed to pay the third and fourth tranches on the rescheduled due dates. Hence, the appellants filed the present suits to claim the third and fourth tranches. The respondents in their defence and cunterclaim contended that the appellants had failed to assist the respondents in preparing and finalising the documents for the purposes of finalising and auditing the outstanding accounts of the companies and the applicable tax returns, as required in the principal agreement. According to the respondents, the remaining RM3m was to be paid to the appellants subject to and upon the appellants performing and completing their obligations under the principal and supplemental agreements. The respondents thus counterclaimed for damages in respect of the appellants' alleged breach of fiduciary duty in respect

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of the companies. The learned trial judge ('the judge') allowed the appellants' claim for the balance payment of RM3m and also allowed the respondents' counterclaim for damages. The appellants appealed against the award of the counterclaim and the respondents cross-appealed against the appellants' claim being allowed. The appellants contended that: (i) the respondents had no locus standi to bring the counterclaim because if at all there existed a breach of fiduciary duty, such breach was one that could only be pursued by the companies and not the respondents; (ii) the appellants did not owe any fiduciary duties to the respondents. The judge had held that the appellants had breached their fiduciary duties to assists the respondents with the finalisation of the accounts, audit and the income tax; and (iii) the respondents failed to produce any evidence of damage/loss alleged. The judge had also considered evidence which was withdrawn. The respondents had initially planned to call one Gan Chong Lim ('SD1') to give evidence. However, since Gan was unable to give evidence, the respondents withdrew Bee Cheng's ('SD2') witness SD2 statement which was initially marked as 'PSD1'. Despite the withdrawal, the judge had relied on SD2 evidence in allowing the counterclaim.

Held, allowing the appeal and dismissing the cross-appeal with costs of RM30,000:

(1) It is trite law that the proper plaintiff in an action brought to redress an injury suffered by a company is the company itself. The respondents' counterclaim was clearly not one of a derivative action. The respondents had no personal cause of action against the appellants. It was only the three companies that stood to suffer any loss should a finding of breach of fiduciary duty was made. The respondents did not show any loss sustained by the respondents themselves in their personal capacity arising out of the alleged fiduciary duty breach. Hence, the respondents did not have the locus standi to bring the counterclaim in respect of the three companies. The judge misdirected himself in allowing the respondents' counterclaim (see paras 15 & 19).

(2) The relationship between the appellants and the respondents was a contractual one based on the principal and supplemental agreements. Being purely commercial agreements wherein parties had dealt at arm's length and on an equal footing, no fiduciary duty arose. The elements/ingredients establishing fiduciary duty were absent on the facts of this case (see para 27).

(3) If the judge had not misled himself on the 'non-evidence' of SD1, he would in all probability come to the conclusion that he could not have relied on the testimony of SD2 to come to the conclusion that the respondents were successful in proving their counterclaim. This was because SD2 was not a party to the principal and supplemental agreements. Neither was she involved in the signing and negotiation of

the terms of the said agreements. She was not in the position to give evidence on the intention of the parties when signing the supplemental agreement. Any evidence by SD2 in respect of the parties' intention of signing the supplemental agreement or recollection of any events/facts which she was not directly involved was hearsay evidence only (see para 30).

(4) In the face of what he deemed as two conflicting versions of events, the judge had opted to rely on His Lordship's own interpretation of the documentary evidence. In that process His Lordship failed to give sufficient consideration to the overall evidence given by the witnesses, especially those of the appellants. This was a serious misdirection by the judge which required appellate intervention (see para 31).

(5) The alleged loss/damage was suffered by the three companies, and not by the respondents in their personal capacity. As such the issue of locus standi also applied to this aspect of the respondents' counterclaim (see para 33).

(6) A party claiming damages must prove actual losses suffered and that the losses suffered were caused by the opposing party's breach. The burden, therefore, was on the respondents to prove their loss/damage, which they had failed to do (see paras 34–35).

[Bahasa Malaysia summary

Perayu-perayu dan responden-responden telah memasuki perjanjian jual beli saham ('perjanjian utama') yang mana perayu-perayu telah bersetuju untuk menjual saham mereka dalam dua syarikat ('syarikat-syarikat tersebut') kepada responden-responden. Keseluruhan harga belian untuk jualan itu adalah RM8juta yang perlu dibayar dalam empat ansuran. Sebagaimana dikehendaki oleh perjanjian utama, perayu-perayu telah memindahkan kesemua saham mereka kepada responden-responden dan meletak jawatan sebagai pengarah-pengarah syarikat-syarikat tersebut. Responden-responden telah membayar perayu-perayu ansuran pertama dan kedua berjumlah RM5juta seperti mana jadual pembayaran. Sebelum tamat tarikh kena bayar untuk ansuran ketiga dan keempat, perayu-perayu dan responden-responden telah menyempurnakan perjanjian tambahan untuk menjadual semula tarikh-tarikh bayaran untuk ansuran ketiga dan keempat. Walaupun begitu, responden-responden telah gagal untuk membayar ansuran ketiga dan keempat itu pada tarikh-tarikh kena bayar yang dijadual semula. Justeru, perayu-perayu telah memfailkan guaman-guaman ini untuk menuntut ansuran ketiga dan keempat itu. Responden-responden dalam pembelaan dan tuntutan balas mereka berhujah bahawa perayu-perayu telah gagal untuk membantu responden-responden dalam menyedia dan menyiapkan dokumen-dokumen bagi tujuan menyiapkan dan mengaudit akaun tertunggak syarikat-syarikat tersebut dan pulangan cukai yang dikenakan,

sebagaimana dikehendaki dalam perjajian utama. Menurut responden-responden, baki RM3juta kena dibayar kepada perayu-perayu tertakluk kepada dan setelah atas perayu-perayu melaksana dan menyelesaikan tanggungjawab mereka di bawah perjanjian-perjanjian utama dan tambahan itu. Responden-responden oleh itu telah menuntut balas untuk ganti rugi berkaitan dakwaan pelanggaran kewajipan fidusiari perayu-perayu berhubung syarikat-syarikat tersebut. Hakim perbicaraan yang bijaksana ('hakim') membenarkan tuntutan perayu-perayu untuk baki bayaran RM3juta dan juga membenarkan tuntutan balas responden-responden untuk ganti rugi. Perayu-perayu bersetuju terhadap award untuk tututan balas itu dan responden-responden telah merayu balas terhadap tuntutan perayu-perayu dibenarkan. Perayu-perayu berhujah bahawa: (i) responden-responden tiada locus standi untuk memulakan tuntutan balas kerana jikapun terdapat pelanggaran kewajipan fidusiari, pelanggaran sebegitu adalah suatu yang hanya boleh dimulakan oleh syarikat-syarikat tersebut dan bukan responden-responden; (ii) perayu-perayu tidak mempunyai apa-apa kewajipan fidusiari terhadap responden-responden. Hakim itu telah memutuskan bahawa perayu-perayu telah melanggar kewajipan fidusiari mereka untuk membantu responden-responden dengan semakan akhir akaun, audit dan cukai pendapatan; dan (iii) responden-responden telah gagal untuk mengemukakan apa-apa bukti kerosakan/kerugian yang dikatakan. Hakim juga telah mengambil kira keterangan yang telah ditarik balik. Responden-responden pada mulanya telah merancang untuk memanggil Gan Chong Lim ('SD1') dan Yan Bee Cheng ('SD2') untuk memberi keterangan. Walau bagaimanapun, oleh kerana SD1 tidak dapat memberi keterangan, responden-responden telah menarik balik kenyataan saksi SD1 yang pada mulanya ditanda sebagai 'PSD1'. Walaupun terdapat penarikan balik itu, hakim telah bergantung kepada keterangan Gan dalam membenarkan tuntutan balas.

Diputuskan, membenarkan rayuan dan menolak rayuan balas dengan kos sebanyak RM30,000:

(1) Adalah undang-undang tetap bahawa plaintif sebenar dalam tindakan yang dimulakan untuk membela kerugian yang dialami oeh syarikat adalah syarikat itu sendiri. Tuntutan balas responden-responden adalah jelas bukan tindakan derivatif. Responden-responden tiada kausa tindakan peribadi terhadap perayu-perayu. Hanya ketiga-tiga syarikat tersebut yang akan mengalami apa-apa kerugian jika dapatan dibuat tentang pelanggaran kewajipan fidusiari. Responden-responden tidak menunjukkan apa-apa kerugian yang dialami oleh responden-responden sendiri dalam kapasiti peribadi yang timbul daripada dakwaan pelanggaran kewajipan fidusiari. Justeru, responden-responden tidak mempunyai locus standi untuk memulakan tuntutan balas berkaitan ketiga-tiga syarikat tersebut. Hakim telah salah arah dalam

membenarkan tuntutan balas responden-responden (lihat perenggan 15 & 19).

(2) Hubungan antara perayu-perayu dan responden-responden adalah kontraktual berdasarkan perjanjian-perjanjian utama dan tambahan. Oleh kerana perjanjian-perjanjian bersifat komersial di mana pihak-pihak menguruskan dengan terperinci dan atas kedudukan sama, tiada kewajipan fidusiari yang timbul. Elemen-elemen/unsur yang membuktikan kewajipan fidusiari tidak terdapat atas fakta kes ini (lihat perenggan 27).

(3) Jika hakim tidak salah arah atas 'non-evidence' SD1, dia akan sampai kepada kesimpulan dalam semua kebarangkalian bahawa dia tidak akan bergantung kepada testimoni SD2 untuk sampai kepada kesimpulan bahawa responden-responden telah berjaya dalam membuktikan tuntutan balas. Ini adalah kerana SD2 bukan pihak kepada perjanjian-perjanjian utama dan tambahan. Apa-apa perjanjian oleh SD2 berkaitan niat pihak-pihak menandangani perjanjian tambahan atau ingatan tentang apa-apa kejadian/fakta yang dia tidak terlibat secara langsung adalah hanya keterangan dengar cakap (lihat perenggan 30).

(4) Berdasarkan apa yang dianggapnya sebagai dua versi kejadian yang bertentangan, hakim itu telah memilih untuk bergantung kepada pentafsirannya sendiri berhubung keterangan dokumentar. Dalam proses itu Yang Arif telah gagal untuk memberikan pertimbangan sewajarnya terhadap keseluruhan keterangan yang diberikan oleh saksi-saksi, terutamanya daripada perayu-perayu. Ini adalah salah arah serius oleh hakim itu yang memerlukan campur tangan mahkamah rayuan (lihat perenggan 31).

(5) Kehilangan/kerugian yang dikatakan itu telah dialami oleh ketiga-tiga syarikat tersebut, dan bukan oleh responden-responden dalam kapasiti peribadi mereka. Oleh itu isu locus standi juga terpakai kepada aspek ini berhubung tuntutan balas responden-responden (lihat perenggan 33).

(6) Pihak yang menuntut ganti rugi hendaklah membuktikan kerugian sebenar yang dialami dan bahawa kerugian yang dialami itu telah disebabkan oleh pelanggaran pihak yang menentang. Beban, dengan itu, adalah terletak pada responden-responden untuk membuktikan kehilangan/kerugian mereka, yang mana mereka telah gagal berbuat sedemikian (lihat perenggan 34–35).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1279–1313.

For cases on locus standi, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 592–593.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89, KBD (refd)
Foss v Harbottle (1843) 67 ER 189 (refd)
Frame v Smith (1987) 42 DLR (4th) 81, SC (refd)
Hospital Products Ltd v United States Surgical Corp & Ors (1984) 156 CLR 41, HC (refd)
Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)
Morello Sdn Bhd v Jacques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor & other appeals [2012] 3 MLJ 616, CA (refd)
Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2) [1982] 1 All ER 354, CA (refd)
Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)

Legislation referred to

Companies Act 1965 s 132

Appeal from: Civil Suit Nos 22–14 of 2009 and 22–08 of 2010 (High Court, Kota Bharu)

Mathew Thomas Philip (Clinton Tan Kian Seng with him) for the appellant.
Alvin John (Sarita Ashok Khandhar with him) for the respondent.

Umi Kalthum JCA:

[1] This is an appeal against the decision of the High Court after full trial where the learned trial judge allowed the appellants' claim against the respondent in Civil Suit No 22–14 of 2009 and Civil Suit No 22–80 of 2010. The learned trial judge had also allowed the respondents' counterclaim against the appellants in both suits.

[2] After due consideration of the respective submissions by the appellants and the respondents, we unanimously allowed the appeal by the appellants and dismissed the respondents cross-appeal with costs of RM30,000 here and below. We now give our reasons.

BACKGROUND FACTS

[3] The appellants and the respondents entered into a sale and purchase of shares agreement dated 16 May 2007 ('the principal agreement') whereby the appellants agreed to sell their shares in two companies, they are Excellent

Bonus Sdn Bhd ('EBSB') and Ideal Task (M) Sdn Bhd ('ITSB') ('the two companies') to the respondents. The principal agreement also included the sale of EBSB's wholly owned subsidiary company known as Sykt Galas Setia (Ulu Kelantan) Sdn Bhd ('SGS') (EBSB, ITSB and SGS 'the three companies').

[4] The total purchase price for the sale of shares in the two companies was RM8,000,000. Clause 3.1 of the principal agreement specifically stipulated that the appellants and respondents agreed that the share purchase price shall be paid as per the tranches below:

Tranches	*Payment dates*	*Amount*
First	Execution of this Agreement	RM3,000,000.00
Second	30.9.2007	RM2,000,000.00
Third	31.01.2008	RM2,000,000.00
Fourth	31.05.2008	RM1,000,000.00
	TOTAL :	RM8,000,000.00

[5] In consideration of the purchase price of RM8,000,000, cll 1 and 4 of the principal agreement required the appellants to transfer all their shares to the respondents and also to resign as directors in the three companies. This consideration was fulfilled by the appellants, and all their shares were effectively transferred to the respondents and the appellants had resigned as directors of the three companies.

[6] The respondents paid the appellants the first and second tranches totalling RM5,000,000 as per the payment schedule. However, before the expiry of due date for the third and fourth tranches, the appellants and the respondents executed a supplemental agreement dated 16 May 2007. Amongst others it was agreed that the payment dates for the third and fourth tranches under the principal agreement be rescheduled as per cl 3.1 which provides as follows:

> In consideration of the premises herein contained, the Parties hereby mutually agree that the Payment Dates of the Third and Fourth Tranches of the Share Price referred to in Clause 3.1 of the Principal Agreement is hereby varied as followed:-

Tranche	Payment Dates	Varied Payments Dates	Amount
Third	31.01.2008	31.12.2008	2,000,000.00
Fourth	31.05.2008	31.12.2009	1,000,000.00

[7] The appellant filed the Civil Suit No 22–14 of 2009 when the respondents failed to pay the third tranche and subsequently filed Suit No 22–80 of 2010 when the respondents failed to pay the fourth tranche.

[8] The respondents in their defence and counterclaim stated that the basis of the sale and purchase of shares for the sum of RM8,000,000 was arrived at by taking into consideration the fundamental terms and conditions and obligations to be fulfilled by the appellants as reflected in cl 1 of the principal agreement which, amongst others, states as follows:

> 1. BASIS OF SALE AND PURCHASE
>
> 1.1 The Parties hereto mutually agree that the sale and purchase of the Sale Shares herein by the Vendors to the Purchasers for the total purchase price of RM8,000,000.00 is strictly on the following basis:-
>
> (a) ...
>
> (b) that requisite steps will be taken by the Purchaser and GCL to finalise and audit the outstanding accounts of the two (2) Companies and SGS for the past years and the applicable tax returns of the respective three (3) Companies and in this respect, the Purchasers together with GCL will procure at the cost and expense of the three (3) Companies to engage such firm of accountants and tax consultant as the three (3) Companies shall so determine after the date of this Agreement and TAC and TYY being the respective directors of EBSB, SGS and ITSB ('the three (3) Companies') prior to the date of this Agreement shall, as and when required by the three (3) Companies, execute all necessary resolutions (including any ratification thereof, if required) and documents in relation to the finalization and audit of the outstanding accounts of the three (3) Companies and the filing of the requisite tax returns of the three (3) Companies;
>
> (c) that TAC and TYY (if applicable, YCF) shall simultaneous with the execution of this Agreement, deliver to the management of EBSB all agreements, documents, files, records and other materials pertaining to all matters and business of the three (3) Companies which are in their custody;
>
> ...

[9] According to the respondents, the remaining RM3,000,000 was to be paid to the appellants subject to and upon the appellants performing and completing their obligations under the principal and supplemental agreements, that is, to assist the respondents in preparing and finalising the documents and audit of EBSB, SGS and ITSB. This position taken by the respondents was substantiated and supported by the terms and conditions found in the supplemental agreement where it states, amongst others:

> WHEREAS
>
> ...
>
> (c) The Parties hereto have mutually agreed to enter into this Supplemental Agreement to elaborate TAC and TYYs obligations to attend to the finalization and auditing of the outstanding accounts of the three (3) Companies referred to in

Clause 1.1 (b) of the Principal Agreement in the manner hereinafter provided and to vary the Payment Dates of the Third and Fourth Tranches of the Share Purchase Price in the manner and upon the terms and conditions hereinafter contained.

...

2. FINALISATION AND AUDITING OF ACCOUNTS OF THE COMPANIES

2.1 The Purchasers had, pursuant to the terms of the Principal Agreement, taken the requisite steps to attend to the finalization and auditing of the outstanding accounts of the three (3) Companies but, had encountered difficulties in finalizing the same as some of the information pertaining to the affairs and businesses of the three (3) Companies prior to the date of the Principal Agreement are within the personal knowledge of TAC and TYY only.

The Vendors acknowledge that under Clause 1.1(b) of the Principal Agreement, TAC and TYY had covenanted that they, being the directors of the respective three (3) Companies prior to the date of the Principal Agreement, will as and when required by the three (3) Companies, execute all necessary resolutions (including any ratification thereof, if required) and documents in relation to the finalization and audit of the outstanding accounts of the three (3) Companies and the filing of the requisite tax returns of the three (3) Companies and in elaboration of the provisions set out in Clause 1.1(b) of the Principal Agreement, TAC and TYY hereby acknowledge and agree that they will assist the Purchaser and wherever applicable, verify and furnish to the 3 Companies or its consultants or the Purchaser all information relating to the affairs and businesses of the 3 Companies which are within their personal knowledge.

2.2 The Vendors hereby further acknowledge and agree that TAC and TYYs obligations set out in Clause 1.1(b) of the Principal Agreement and Clause 2.1 herein shall continue until the finalisation and auditing of the outstanding accounts of the three (3) Companies.

[10] The respondents emphasised that these obligations imposed on the appellants were by no means unreasonable since the appellants, particularly the first and second appellants, were at all times prior to the execution of the principal agreement and supplemental agreement, the directors of EBSB and SGS and the first appellant was also a director of ITSB and that the first appellant was in charge of all corporate affairs and daily financial planning in these three companies. The respondents at all times contended that as a result of the appellants' refusal neglect and/or failure to forward and/or hand over the complete documentations and/or records relating to the three companies and further thereto failed, neglected and/or refused to provide full disclosure and/or assistance to the respondent relating to the corporate affairs and financial information of these three companies, the respondents were unable to

audit and finalise and/or update the records and accounts of EBSB, ITSB and SGS for the purposes of submission of the companies' income tax annual returns to the Inland Revenue Board or Lembaga Hasil Dalam Negeri ('LHDN'). By reason of the breach of contract committed by the appellants, the respondents were no longer obligated to pay the remainder sum of RM3,000,000.

[11] The respondents contended that at all material times despite having requested and reminded the appellants to perform their obligations under the principal agreement read with the supplemental agreement, the appellants nevertheless had refused, neglected and/or failed to comply thereby breaching the terms of the principal agreement read with the supplemental agreement and in turn the respondents were not compelled to perform their part of the bargain by paying the balance RM3,000,000. The respondents filed a counterclaim against the appellants for damages in both suits in the main for breach of their duties as directors of EBSB in respect of first appellant and second appellant and director of SGS and ITSB in respect of the first appellant and breach of fiduciary duty in respect of all three companies.

HIGH COURT DECISION

[12] The learned trial judge allowed the appellants' claim against the respondents for the balance payment of RM3,000,000 as the outstanding balance of the purchase price under principal agreement read together with the supplemental agreement and allowed the respondents' counterclaim. The learned trial judge also ordered that the damages for the counterclaim be assessed by the registrar and be set-off against the RM3,000,000 awarded to the appellants. The appellants appealed against the award of the counterclaim to the respondents ('the appellants' appeal') and the respondents appealed against the appellants' claim being allowed ('the respondents' cross-appeal').

OUR DECISION

The appellants' appeal

[13] We begin with the appellants' appeal. In summary, the appellants submitted that:

(a) the respondents had no locus standi to bring the counterclaim against the appellants;

(b) the appellants did not owe any fiduciary duties to the respondents;

(c) in allowing the counterclaim, the learned High Court judge made fundamental errors in his assessment of evidence at the trial; and

(d) the respondents failed to produce any evidence of damage/loss alleged.

Locus standi

[14] It was the appellants' submission that the respondents' counterclaim against the appellants was founded on the allegation that the appellants had breached their fiduciary duty/obligation against the three companies in that:

(a) the respondents alleged that the appellants as directors of the three companies owed fiduciary duties stemming from their positions as directors to act in the best interests of the three companies and relied on s 132 of the Companies Act 1965; and

(b) the purported breaches of fiduciary duty by the appellants had caused the three companies to now be exposed to the risk of prosecution and/or the imposition of substantial liabilities by the Companies Commission of Malaysia ('CCM') and/or the LHDN for failing to file the three companies' tax returns since the year 2002.

[15] It was submitted that if at all there existed a breach of fiduciary duty (which was denied by the appellants), such breach was one that could only be pursued by the three companies as the parties whom such fiduciary duties were owed to, and not the respondents. It was not for the respondents to assume such standing and claim on behalf of the three companies, even if they are the directors of the three companies. It was therefore submitted that the learned High Court judge in allowing the counterclaim was misguided and failed to appreciate that the respondents did not have the locus standi to bring this counterclaim against the appellants. That it is trite law that the proper plaintiff in an action brought to redress an injury suffered by a company is the company itself — see *Foss v Harbottle* (1843) 67 ER 189. In the Court of Appeal case of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor & other appeals* [2012] 3 MLJ 616 it was held that, at p 644 paras 161 and 163:

> [161] ... the company being a legal person is distinct from its members, whose individual identities are substantially merged in the corporate structure, the rights and liabilities arising out of the company's affair are channelled through the company.
>
> [163] ... where wrongs were done to the company, in general, the cause of action belonged to the company ... and an individual member ... has no standing to enforce it ...

[16] Where an individual member of a company is allowed to sue it is to prevent a serious wrong from going unremedied because the wrongdoers control the company. Where it is allowed, the member brings a derivative action and sues on behalf of the company. But the respondents' counterclaim was clearly not one of a derivative action.

[17] It was evident from the pleadings and evidence by the respondents at trial that the respondents had no personal cause of action against the appellants in the counterclaim. The respondents, it was submitted, had not only failed to establish a locus standi that was independent of the three companies, but had also adduced evidence affirming the position that it was only the three companies that stood to suffer any loss should a finding of breach of fiduciary duty was made. No where in their evidence did the respondents put forth any proof to show any loss sustained by the respondents themselves in their personal capacity arising out of the alleged fiduciary duty breach. The respondents' witness, Gan Bee Chong ('DW2') had this to say in his witness statement at Q & A 24, p 467, AR *Bhg* B of *Jld* 4/6:

> Q24. What is the result of the Plaintiff's breach of the Principal Agreement and Supplemental Agreement?
>
> A24. The Plaintiff's refusal and failure to assist the Defendants to finalise and audit all outstanding accounts for these 3 companies have now caused these companies to be exposed to substantial liabilities especially on imposition of penalties by LHDN for not submitting the tax return forms since the year 2002 onwards. The RM 3.0 million allegedly owing or due to the Plaintiffs, if any which is denied herein, is nothing compared to the losses that the Defendants and these companies will suffer as a result of the Plaintiffs' breach and therefore they should not be given any penny more than what they have already gotten from the Defendants which is RM 5.0 million, a figure which is already at an overvalued price! The Plaintiffs should not be able to benefit from their wrongdoings and there is just no justification in paying them the balance RM 3 million.

[18] To merely state that the respondents would suffer detriments purely because the three companies would suffer detriments (of which were mere speculation) did not automatically create locus for the respondents to bring the counterclaim. It is clear law that no personal right exists where an individual has suffered a loss that is merely a reflection of the loss suffered by the company — see *Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)* [1982] 1 All ER 354.

[19] Since:

(a) the respondents are directors of the three companies;

(b) their counterclaim was brought in their personal capacity and not in the name of the three companies; and

(c) their counterclaim was for the purported breach of the appellants' fiduciary duty in respect of the three companies,

we agreed with the appellants' submission that the respondents did not have the locus standi to bring the counterclaim in respect of the three companies.

There are ample authorities on this issue, some of which had been referred to by the appellants. The learned trial judge had misdirected himself when he had allowed the respondents' counterclaim. As such, we would have allowed the appellants' appeal on that premise alone, but we had further deliberated on the other issues raised by the appellants.

Fiduciary duty

[20] It was submitted by the appellants that the learned trial judge had made a fundamental error in allowing the counterclaim on the basis of His Lordship's incorrect conclusion that the respondents had proven that the appellants breached their fiduciary duties to assists the respondents with the finalisation of the accounts, audit and the income tax, which His Lordship further concluded had in effect caused the respondents to suffer loss/damage. This was what His Lordship had stated (at p 11, para 33, RRT):

> Berdasarkan fakta dan keadaan tersebut saya mendapati atas imbangan kebarangkalian bahawa Defendan Berjaya membuktikan bahawa Plaintif telah melanggar tugas fiduciari untuk membantu Defendan dalam menyempurnakan laporan kewangan, oudit dan cukai pendapatan syarikat yang mana mengakibatkan Defendan mengalami kerugian. Oleh itu saya mendapati Defendan berjaya membuktikan Tuntutan Balas mereka terhadap Plaintif.

[21] The respondents' argument that the appellants owed fiduciary duties to assist the respondents flowing from their respective positions as directors of the three companies was flawed. This was because the respondents brought their counterclaim in their personal capacity and not as a derivative action, or in any other capacity that entitled them to claim and act on behalf of the three companies.

[22] It is trite law that directors of a company do not owe any fiduciary duties to members of the company individually or collectively. It was submitted that there was no foundation upon which a fiduciary relationship could arise between the appellants and the respondents and that whatever obligations that bound the parties were limited to the contractual obligations arising out of the principal agreement and the supplemental agreement. There cannot be any superceding fiduciary obligation which the learned judge had erred in making a finding of.

[23] Reference was made to the Canadian Supreme Court case of *Frame v Smith* (1987) 42 DLR (4th) 81 (which was referred to in the Court of Appeal case of *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265) wherein Wilson J explained that the are certain common features discernible in the context in which

fiduciary duties have been found to exist. There are three general characteristics as follows:

(a) the fiduciary has scope for the exercise of some discretion or power;

(b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

(c) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

[24] *Tengku Abdullah ibni Sultan Abu Bakar*'s case had also referred to the Australian High Court's case of *Hospital Products Ltd v United States Surgical Corp & Ors* (1984) 156 CLR 41 wherein the High Court of Australia had discussed, inter alia, the various elements relevant in establishing the existence of a fiduciary duty and specifically held that a commercial relationship, such as the ones between the appellants and the respondents in this case, does not fall within the ambit of fiduciary relationship. At pp 296–297, as quoted in *Tengku Abdullah*'s case, Gibbs CJ had this to say:

> On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose ...

[25] The appellants and the respondents, it was submitted, had entered into the principal agreement to buy and sell shares. It was a purely commercial transaction and conducted at arm's length. There was no personal relationship of trust between the appellants and the respondents in this regard.

[26] It was submitted that the learned judge had erred in failing to distinguish between the two district legal concepts of fiduciary duties and contractual obligations. He had equated the obligations arising out of the principal and supplemental agreements to fiduciary duties, going as far as to use the terms interchangeably. The learned judge in his grounds of judgment had elaborated on the purported facts that the appellant had breached their contractual obligations under the principal agreement and the supplemental agreement. He then concluded that the respondents had successfully proven on the balance of probabilities that the appellants had breached their fiduciary duties to assist the respondents. He failed to explain how the contractual obligations purportedly owed by the appellants to the respondents ended up becoming the basis or source of a finding of liability on the breach of fiduciary duties against the appellants. Therefore, it was the appellants' submission that the learned judge had erred in law and in fact in misconstruing the nature of the relationship between the parties and the consequential obligations that arose out of the principal and supplemental agreements. There was no element of a

fiduciary relationship between the appellants and the respondents. The appellants hence prayed His Lordship's ruling in allowing the counterclaim be reversed.

[27] We agreed with the submission of the appellants that the relationship between the appellants and the respondents was a contractual one based on the principal and supplemental agreements. Being purely commercial agreements wherein parties had dealt at arm's length and on an equal footing, and in the words of Gibbs CJ in *Hospital Products Ltd*, 'indicating that no fiduciary duty arose'. The elements/ingredients establishing fiduciary duty as explained in the authorities referred to before this were absent on the facts of this case. We agreed that the learned trial judge had used the terms contractual obligations interchangeably with fiduciary duties and in the process had hereby misled himself into finding that there was fiduciary duty owed by the appellants to the respondents and that that duty had been breached by the appellants. The learned judge had failed to explain how the contractual obligations purportedly owed by the appellants to the respondents became the basis of a finding of liability for the breach of fiduciary duty against the appellants.

[28] We found that the learned judge had misdirected himself on this issue especially when he had considered evidence which was withdrawn. The respondents had initially planned to call two witnesses, namely the third respondent, Gan Chong Lim, and his sister Yan Bee Cheng ('SD2'). Since Gan Chong Lim ('SD1') was unable to give evidence at trial, the respondents withdrew Gan Chong Lim's witness statement which was initially marked as 'PSD1'. Despite the withdrawal of Gan Chong Lim's evidence (Tab 14, Core Bundle, pp 370–373) the learned judge continued to rely and to consider the evidence of SD1 in allowing the counterclaim. The learned judge at pp 3–4, paras 10–12 and 14 of the RRT, stated as follows:

> 10. Keterangan pihak Defendan dikemukakan melalui Defendan Ketiga (SD1) dan Gan Bee Cheng, adik beliau (SD2). Defendan tidak mempertikaikan fakta berhubung Perjanjian Utama dan Perjanjian Tambahan tersebut. Defendan juga mengakui bahawa saham-saham tersebut telah dipindahmilik oleh Plaintif kepada mereka. Defendan juga mengakui harga saham-saham yang dibeli adalah RM 8 juta dan mereka telah membayar sejumlah RM 5 juta kepada Plaintif. Namun, Defendan menafikan bahawa mereka bertanggungan untuk membayar baki RM 3 juta sepertimana yang dituntut oleh Plaintif.
>
> 11. Secara ringkasnya dan selaras dengan pliding (Pernyataan Pembelaan dan Tuntutan Balas Defendan) menurut SD1 dan SD2, Plaintif telah gagal untuk memenuhi tugas fiduciary/obligasi mereka di bawah kedua-dua Perjanjian tersebut kerana gagal membantu Defendan dalam menyempurnakan (to finalise) laporan/penyataan akaun, odit dan cukai pendapatan syarikat-syarikat berkenaan. Menurut SD1 dan SD2 [Plaintif] gagal mengemukakan maklumat syarikat yang hanya dalam pengetahuan dan kawalan mereka.

12. Menurut SD1 dan SD2 Defendan sememangnya mampu dan berkeupayaan untuk membayar baki bagi harga saham pada tarikh yang ditetapkan tetapi mendakwa sehinggalah obligasi tersebut dilaksanakan oleh Plaintif, mereka berhak untuk tidak membayar/menjelaskan ansuran ketiga dan keempat bagi saham-saham tersebut.

...

Dapatan dan Keputusan Mahkamah

14. Saya telah meneliti keterangan yang dikemukakan secara naratif, kertas kausa, isu-isu yang dikemukakan serta hujahan peguamcara kedua-dua pihak dan setelah meneliti secara menyeluruh perkara tersebut bersama-sama keterangan lisan saksi-saksi, saya mendapati sepertimana berikut:

...

[29] We refer to the Federal Court case of *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577at p 590; [2010] 6 CLJ 857 at p 872, where James Foong FCJ (as he then was) held as follows:

Question 4 : Can the Court of Appeal Reinstate Withdrawn Evidence and Rely On It

[38] Question (iv) relates to the impugned evidence that was deleted by DW1 from his witness statement. The Court of Appeal ruled that the trial judge had misdirected himself when he drew adverse inference on DW1's failure to produce documentary evidence to support the existence of a pool account when in truth this witness was prevented from doing so by the trial judge. As discussed, this is incorrect. The impugned evidence was not withdrawn at the insistence of threat by the trial judge. It was withdrawn voluntarily by the witness. Once this impugned evidence is absent no party can rely on it, not even the court. Such evidence just does not exist for the Court of Appeal to support its decision that since there was a pool account there must be a likelihood of a sale or arrangement of the 500,000 special rights issue.

[30] If the learned trial judge had not misled himself on the 'non-evidence' of SD1, he would in all probability come to the conclusion that he could not have relied on the testimony of SD2 to come to the conclusion that the respondents were successful in proving their counterclaim. This was because SD2 was not a party to the principal and supplemental agreements. Neither was she involved in the signing and negotiation of the terms of the said agreements. She was not in the position to give evidence on the intention of the parties when signing the supplemental agreement. We therefore agreed with the submission of the appellants that any evidence by SD2 in respect of the parties' intention of signing the supplemental agreement or recollection of any events/facts which she was not directly involved would tantamount to hearsay evidence only.

[31] In the face of what he deemed as two conflicting versions of events, the learned trial judge had opted to rely on His Lordship's own interpretation of the documentary evidence. In that process His Lordship failed to give sufficient consideration to the overall evidence given by the witnesses, especially those of the appellants. The learned judge stated, at p 9, para 27, RRT, as follows:

> 27. Berdasarkan keterangan yang dikemukakan oleh kedua-dua pihak sepertimana yang dijangkakan mereka memberikan versi yang berlawanan berhubung perkara tersebut. Dalam keadaan ini bagi memutuskan isu-isu tersebut, pada hemat saya, keterangan yang paling selamat diambilkira oleh Mahkamah ini adalah keterangan dokumentar (documentary evidence) iaitu, Perjanjian Utama dan Tambahan tersebut (Ekshs 'P1' dan 'P2').

We viewed this as another serious misdirection by the learned judge which required appellate intervention. See further our views when considering the respondents' cross-appeal in para 36 below. Based on the above, we were of the view that the appellants did not owe any fiduciary duty to the respondents.

Loss/Damage

[32] It was submitted by the appellants that the learned trial judge had erred in awarding damages for the respondents' counterclaim to be set-off against the award of RM3m awarded to the appellants as the respondents had clearly failed to adduce any evidence of the occurrence or existence of damages/or loss allegedly sustained by them due to the purported breach of fiduciary duty. The respondents had merely made bare assertions, without adducing any evidence to support the claim that the three companies have been exposed to the risk of prosecution and or the imposition of substantial liabilities by the CCM and/or the LHDN for failing to submit accounts for the three companies and for failing to file the three companies' tax returns since the year 2002.

[33] Here again we noted that the alleged loss/damage to be suffered is by the three companies, and not by the respondents in their personal capacity. As such the issue of locus standi, as stated above, also applied to this aspect of the respondents' counterclaim.

[34] Further, it is trite law that a party claiming damages must prove actual losses suffered and that the losses suffered were caused by the opposing party's breach. In *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577, the Federal Court had applied the principle in the English case of *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89, wherein Lord Goddard was quoted as holding that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying: 'That is what I have lost; I ask you to give me these damages' They have to prove it.

[35] The burden, therefore, was on the respondents to prove their loss/damage, which they had failed to do. Their counterclaim must therefore fail on this aspect as well.

The respondents' cross-appeal

[36] We dismissed the cross-appeal of the respondents for the following reasons:

(a) cl 3.1 of the principal agreement and cl 3.1 of the supplemental agreement provide expressly the manner, the amounts and dates the payments are to be made by the respondents to the appellants;

(b) the terms of the principal agreement are clear and express requiring the respondents to make the agreed payments totalling RM8,000,000 within the stipulated time in consideration of the appellants transferring the agreed shares to the respondents. The appellants were also to resign as directors of the three companies;

(c) cl 11 of the principal agreement stipulates that any time or period mentioned in the principal agreement may be extended by mutual agreement between the parties and time wherever mentioned in the principal agreement shall be the essence of the contract;

(d) cl 4.1 of the supplemental agreement provides as follows:

> 4.1 This Supplemental Agreement and the Principal Agreement constitute the entire agreement and understanding between the Parties with respect to the matters dealt with in this Supplemental Agreement and the Principal Agreement, *and all terms and conditions in the Principal Agreement shall, except as amended herein, remain in full force and effect, and this Supplemental Agreement and the Principal Agreement shall be read as a single integrated document*.

By virtue of the said cl 4.1, the terms of cl 11 of the principal agreement on time being the essence of the contract apply to the supplemental agreement;

(e) despite time being the essence of the contract, and in breach of the principal and supplemental agreement, the respondents had failed to make payments in respect of the third and fourth tranches to the appellants in contravention of cl 3.1 of the supplemental agreement. We agreed with the finding of the learned High Court judge that since the respondents had failed to make the said payments to the appellants (which was not disputed), the respondents be ordered to do so. We therefore agreed with the learned judge's order that the appellants claim for the balance share purchase price be allowed. With the same token the respondents' cross-appeal was dismissed by us. It was plain to us that the

letter of the contract being unambiguous must be given effect to by us. More so in the light of the fact that the appellants had fulfilled their consideration by effecting the transfer of the said shares to the respondents and had accordingly resigned as directors of the three companies;

(f) cl 3.1 of the supplemental agreement does not expressly provide for the payment of the third and fourth tranches to be conditional to the fulfilment of the appellants' 'obligations' in cl 2 of the same and should not be construed as such;

(g) cl 2.1 of the supplemental agreement, moreover, is couched not in imperative terms as 'obligations' (even though cl 2.2 use the word 'obligations') of the appellants towards the respondents but more towards 'assisting' the respondents in the finalisation and auditing of account of the three companies, (see para 9 above for cl 2.1); and

(h) we agreed with the submission of the appellants that the respondents could not unilaterally suspend the payments in view of the fact that the appellants had received all the said shares and are now the registered owners of the said shares.

Appeal allowed and cross-appeal dismissed with costs of RM30,000.

Reported by Kanesh Sundrum